

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

74-1258

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,
CELANESE CORPORATION, et al.,
Intervenors.

ON PETITION FOR REVIEW

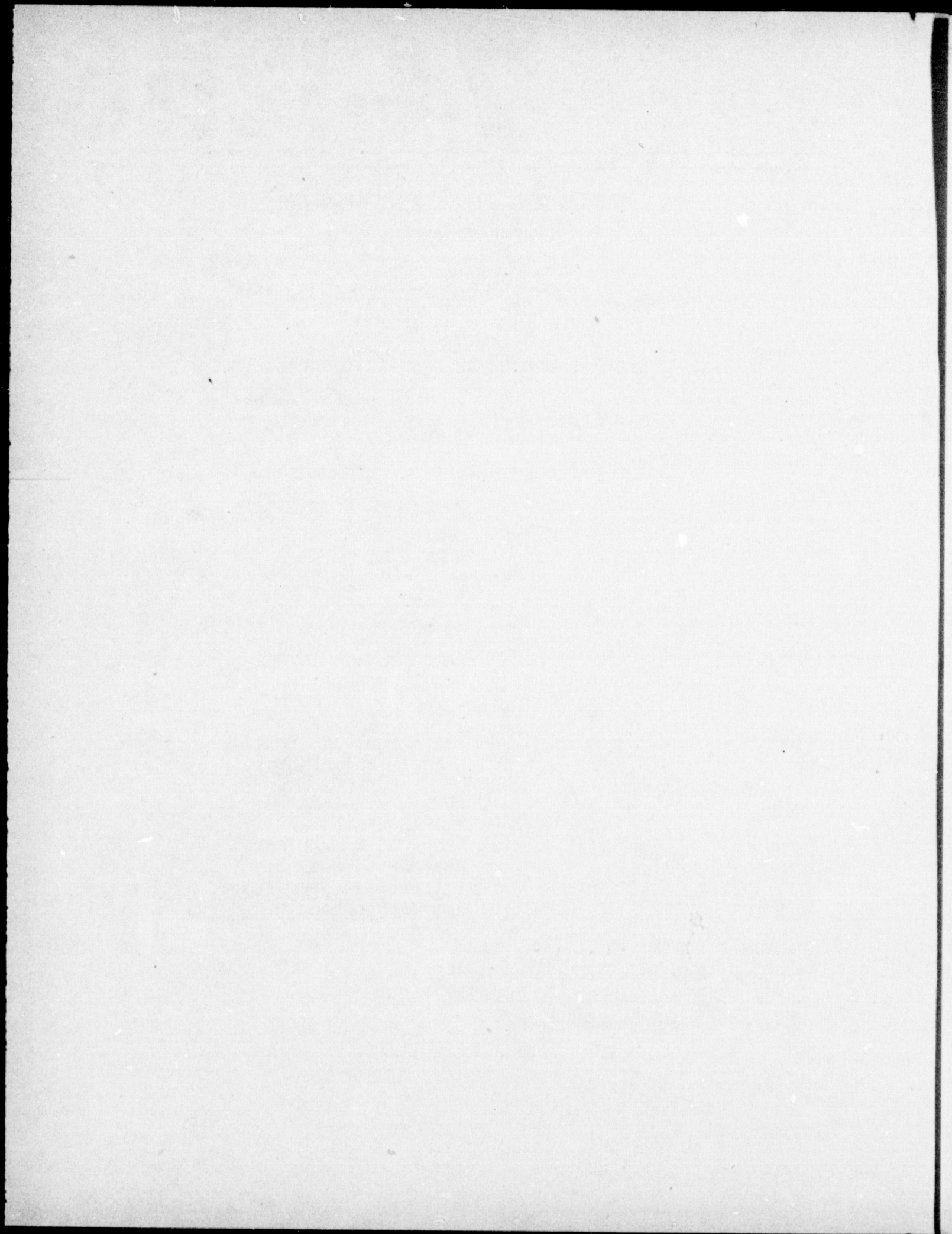
BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

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BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY,
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JURISDICTION

This Court has jurisdiction, pursuant to Section 509(b)(1) of the Federal Water Pollution Control Act Amendments of 1972 (the "FWPCA" or the "Act"), 33 U.S.C. §1369(b)(1), to review the action of the Environmental Protection Agency Administrator

in promulgating regulations under Sections 301, 306, and 307 of the Act, 33 U.S.C. §§1311, 1316, and 1317.^{1/}

ISSUES PRESENTED

1. Whether this Court has exclusive jurisdiction under Section 509(b)(1) of the Federal Water Pollution Control Act and to hear and decide the issues raised by Petitioner in challenging the effluent limitations and effluent limitations guidelines promulgated under Sections 301 and 304 of the Act.

2. Whether a limited provision for modification of effluent limitations in unusual circumstances is consistent with the regulatory scheme of the Federal Water Pollution Control Act.

INTRODUCTION

Respondent is placed in an unusual situation by this action. Petitioner and Respondent agree that the regulations promulgated by Respondent, as a general matter, correctly implement the intent of the Federal Water Pollution Control Act,

^{1/} Although both Petitioner and Respondent agree that jurisdiction properly lies in this Court, Intervenor has challenged that jurisdiction. Petitioner has addressed the jurisdictional question in its brief, and Respondent will also treat that issue, infra.

as amended, (the "Act") and as such are properly reviewable by this Court, but differ as to the validity of a certain provision in the regulations. The Chemical Industry Intervenors have entered the case to assert that this Court lacks jurisdiction to review these regulations because (1) despite Respondent's intent, these regulations do not establish Section 301 effluent limitations or (2) that if these regulations are effluent limitations, then they are beyond Respondent's authority to promulgate.^{1a/}

A. Statutory Background

The Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) drastically changed the national approach to control of water pollution. Earlier statutes had relied on water quality standards as the primary vehicle for controlling pollution. Enforcement was not generally effective because of the difficulty of establishing a reliable correlation

^{1a/} The regulations at issue pertain to the following point source categories (40 CFR parts and Federal Register citations for the respective categories in parentheses): Feedlots (Part 412, 39 Fed. Reg. 5703), Glass Manufacturing (Part 426, 39 Fed. Reg. 5711), Phosphate Manufacturing (Part 422, 39 Fed. Reg. 6579), Cement Manufacturing (Part 411, 39 Fed. Reg. 6589), Rubber Manufacturing (Part 428, 39 Fed. Reg. 6660), Ferroalloy Manufacturing (Part 424, 39 Fed. Reg. 6805), Asbestos Manufacturing (Part 427, 39 Fed. Reg. 7525), Meat Product and Rendering Processing (Part 432, 39 Fed. Reg. 7894), Non-ferrous Metals Manufacturing (Part 421, 39 Fed. Reg. 128221).

between effluent discharges by a particular source and the water quality of a given body of water, particularly where a large number of dischargers were congregated on one water body. The 1972 Amendments changed the approach to require effluent limits for dischargers based on technology, not on the quality of the receiving water. The Senate Report explained this change of approach as follows:^{2/}

The legislation recommended by the Committee proposed a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits.

* * * * *

The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality. Water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations defensible in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.

Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.

^{2/} A Legislative History of the Water Pollution Control Act Amendments of 1972 (hereinafter Leg. Hist.), Congressional Research Service, Serial No. 93-1 (two volumes), at 1425-26.

The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality.

Thus, Section 301(b) requires dischargers of pollutants to achieve in 1977 and 1983 certain levels of pollution abatement based on technology as determined by the Administrator pursuant to the direction of Section 304(b) which outlines the relevant considerations to be made by the Administrator in establishing these levels of control. Water quality standards were retained in Sections 301(b) and 302 to supplement the technological limitations. The vehicle adopted by the Congress to implement and enforce these limitations was a permit system established in Section 402 which provides for each discharger being issued a permit to discharge which contains these effluent limitations and which can be enforced pursuant to Section 309 should the conditions be violated.

An additional factor in the Congressional decision to adopt an effluent limitations approach was the desire to establish, to the extent possible, uniformity throughout the country for similar dischargers both as a matter of fairness and to avoid the adoption in certain areas of lax water quality standards which would cause those areas to become pollution havens.

In the 1972 Amendments Congress also ordered the Administrator to propose and ultimately promulgate standards for the control of discharges from newly constructed sources of effluents. Section 306, 33 U.S.C. §1316. The Administrator is also authorized to list toxic pollutants and to publish effluent standards or prohibitions for the toxics. Section 307, 33 U.S.C. §1317.

Enforcement under the 1972 Water Act hinges on one crucial sentence in Section 301, 33 U.S.C. §1311(a):

Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

Therefore, every discharge of any pollutant into the Nation's waters is illegal, unless the source remains in compliance with the following requirements: effluent limitations of Section 301(b), based on the best practicable control technology currently available by 1977 based on the best available technology economically achievable by 1983, or more stringent water quality standards; water quality related limitations of Section 302; national standards of performance of Section 306 for new sources; effluent standards of Section 307 for toxic pollutants; permits of Section 318 for

approved aquaculture projects; and permits issued under Section 402 by the Federal or State authorities.

Enforcement procedures are now direct and speedy. The Federal Administrator can enforce these various requirements by notifying the affected State of the violation and waiting 30 days for the State to act or by immediately assuming enforcement responsibility himself and issuing a compliance order or bringing a civil suit against the polluter. Section 309, 33 U.S.C. §1319.

This action centers around EPA's implementation of Sections 301(b) and 304(b) through regulations establishing effluent limitations guidelines and standards. Petitioners object to one section of certain of these guidelines. Intervenors are not directly interested in the substance of the regulations in issue here, but have intervened to submit their views on the allegedly erroneous approach to the regulations adopted by EPA and the consequent necessity to dismiss this action for lack of jurisdiction. Intervenors have raised the identical arguments in 12 cases in the Fourth Circuit Court of Appeals challenging the Inorganic Chemicals industry regulations and in the United States District Court for the Western District of Virginia.^{3/}

^{3/} In the United States Court of Appeals for the Fourth Circuit: E.I. DuPont de Nemours & Co. v. Russell E. Train, No. 74-1261; Allied Chemical Corp. v. Russell E. Train, No. 74-1290; Dow Chemical

B. Facts of this Case

EPA's approach to developing regulations implementing Sections 301(b) and 304(b), as well as Sections 306 and 307(b), were outlined in a Notice of Public Review Procedures published on August 6, 1973 (38 Fed. Reg. 21202). That notice explained that EPA, with the assistance of contractors, would review various industrial categories, starting with those outlined in Section 306(b)(1)(A). That review would be set forth in a report upon which interested persons could comment. EPA would then prepare a draft "Development Document" and propose regulations identifying the level of effluent reduction achievable by 1977 and 1983.

Comment was again solicited on the draft Development Document and the proposed regulation. Proposals for the nine industries under review here were made in the Autumn of 1973. Final regulations

Footnote 3 Continued

Co. v. Russell E. Train, No. 74-1301; Olin Corp. v. Russell E. Train, No. 74-1302; FMC Corp. v. Russell E. Train, No. 74-1303; American Cyanamid Co. v. Russell E. Train, No. 74-1304; Stauffer Chemical Co. v. Russell E. Train, No. 74-1406; Diamond Shamrock Corp. v. Russell E. Train, No. 74-1588; PPG Industries, Inc. v. Russell E. Train, No. 74-1589; BASF Wyandotte Corp. v. Russell E. Train, No. 74-1590; Cities Service Co. v. Russell E. Train, No. 74-1670; NL Industries, Inc. v. Russell E. Train, No. 74-1741, in the United States District Court for the Western District of Virginia; E.I. DuPont de Nemours, et al. v. Russell E. Train (Civ. No. 74-51-R).

were promulgated in January and February of 1974. Regulations implementing Section 306 of the Act establishing standards of performance for new sources, and Section 307(c) establishing pretreatment standards for new sources were also promulgated. In the final regulations, a provision allowing for modification of the standards in certain situations was included (Pet. Br. at 15). Petitioners filed for review of these regulations pursuant to Section 509(b)(1)(E) of the Act which provides for review in the United States Court of Appeals of the Administrator's action "in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306." Intervenor moved to intervene in the action on March 25, 1974 and that motion was subsequently granted by this Court. Additional facts are set forth in Petitioner's Brief and are not repeated here.

ARGUMENT

I

THIS COURT, AS THE APPROPRIATE COURT OF APPEALS, HAS EXCLUSIVE JURISDICTION UNDER SECTION 509(b)(1) OF THE FEDERAL WATER POLLUTION CONTROL ACT TO HEAR AND DECIDE THE ISSUES RAISED BY THE PETITIONER IN CHALLENGING THE EFFLUENT LIMITATION GUIDELINES PROMULGATED UNDER SECTIONS 301 and 304 OF THE ACT

Petitioner and Respondent are in essential agreement on the issue of the jurisdiction of this Court to hear this matter. With certain minor exceptions, which will be evident from the

subsequent discussion, Respondent concurs in the arguments presented by Petitioner in Part I of its brief.^{4/} The following points are submitted in support of those arguments.

Where, as here, Congress has established a statutory scheme for judicial review, only those courts upon which Congress has bestowed authority can assume jurisdiction. In Whitney Bank v. New Orleans Bank, 379 U.S. 411, 420 (1965), the Supreme Court, relying upon the statutory scheme for review, applied this principle to restrict judicial review of agency action only to the courts of appeals:

[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. . . . To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.

District court review in such a case would be coram non iudice. Courts of Appeals have followed this principle in cases where Congress vested in particular courts the exclusive power of judicial review of agency determinations. In Frito-Lay, Inc. v. F.T.C., 380 F.2d 8, 10 (1967), the Fifth Circuit found exclusive

^{4/} Pet. Br. at 17-32.

jurisdiction, according to the statutory procedures, in the courts of appeals. The Court stated, "where Congress has provided an adequate procedure for judicial review, that procedure must be followed." See also UMC Industries, Inc. v. Seaborg, 439 F.2d 953, 955 (C.A. 9, 1971); Oling v. Air Line Pilots Association, 346 F.2d 270, 276 (C.A. 7, 1965). Even if the agency's enabling act does not state that the scheme provided for judicial review is exclusive, it must be presumed to be exclusive. Whitney Bank, supra, 379 U.S. at 422; Coca-Cola Co. v. F.T.C., 475 F.2d 299, 302 (C.A. 5, 1973); Nader v. Volpe, 466 F.2d 261, 265-268 (C.A.D.C., 1972). The rationale for finding in the statutory scheme exclusive court of appeals jurisdiction to review agency action has been articulated in Fort Worth Nat. Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47, 52 (C.A. 5, 1972):

Congress expected to prevent conflicting rulings and duplicative proceedings that inevitably would result from permitting collateral attack of Corporation orders in the various district courts. Providing an exclusive method of review facilitates efficient and timely resolution of disputes concerning agency actions and promotes uniformity in judicial decisions.

Even though the Congressional scheme for judicial review fails to include some ancillary questions in its explicit grant of restricted jurisdiction, courts with jurisdiction under

the statutory procedures should also hear and determine these ancillary questions in order to avoid bifurcation of judicial review. Foti v. Immigration Service, 375 U.S. 217, 224-230 (1963); Tomah-Mauston Broadcasting Co. v. F.C.C., 306 F.2d 811, 812 (C.A.D.C. 1962).

A. This Court has exclusive jurisdiction, according to the explicit provisions of Section 509, to review the effluent limitations promulgated by the Administrator pursuant to Section 301(b), 33 U.S.C. §1311(b). - Section 509(b)(1) of the Federal Water Pollution Control Act of 1972, 86 Stat. 816, 33 U.S.C. §1369(b)(1), bestows upon the courts of appeals the exclusive jurisdiction to review EPA actions in promulgating any effluent limitations under Section 301 of the Act. The language of Section 509(b)(1) provides:

Review of the Administrator's action (A) in promulgating any standard of performance under section 306, . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or

after such date only if such application is based solely on grounds which arose after such ninetieth day. [Emphasis supplied.]5/

Section 301, 33 U.S.C. §1311, states in its relevant provisions:

(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved —

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

5/ Intervenors have expressed an incredibly strained interpretation of Section 509(b)(1), (Int. Br. at 32-39), emphasizing that Congress used language in the alternative, "approving or promulgating" to indicate that the Administrator may not always have the authority to promulgate effluent limitations. This amazing interpretation merits a few words of reply: (1) It is hard to grasp why the use of these two words in the jurisdictional section should limit the Administrator's power under the substantive provisions of the Act such as Section 301. (2) The language of Section 509(b)(1) granting court of appeals review of the Administrator's action in "approving or promulgating" effluent limitations strengthens the EPA's position that Congress anticipated that the EPA would promulgate effluent

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act. . . .

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

Footnote 5 Continued

limitations pursuant to Section 301. Section 301(e) explicitly states the Congressional intent that effluent limitations be established. This is the same language Congress used in Section 302, "effluent limitations . . . shall be established," review of which is governed by the same provision of Section 509(b)(1). (3) The language of Section 509(b)(1) in the alternative, "approving or promulgating" merely indicates the review of the Administrator's action with respect to effluent limitations must be reviewed in the Courts of Appeals, regardless of whether the Administrator's action was an approval of some action establishing effluent limitations (e.g. pursuant to Section 301(c) or (d)) or a promulgation of effluent limitations.

Subsections (d) and (e) demonstrate that Congress intended for EPA to establish, periodically review and revise, and apply effluent limitations which specify the standards to be achieved by 1977 (application of the best practicable control technology) and by 1983 (application of the best available technology economically achievable). Unless the Environmental Protection Agency is authorized to promulgate effluent limitations, which can be reviewed, revised, and applied, Subsections (d) and (e) make no sense, since there would otherwise be no regulations upon which the requirements of those Subsections could operate.^{6/} The discussion of the legislative history of Section 301 and its relation to Section 304(b) and Section 402, infra, will eliminate any doubts as to the Congressional intention to authorize EPA to establish, by regulations, the effluent limitations implementing Section 301.

The Act, in Section 502(11), 33 U.S.C. §1362(11) broadly defines effluent limitations as:

[A]ny restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into

^{6/} Section 302, 33 U.S.C. §1312, also takes for granted the establishment of effluent limitations pursuant to Section 301.

navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.^{7/}

Beyond any doubt, the EPA has promulgated effluent limitations, pursuant to Section 301 and within the wide ambit of the definition of Section 502(11).

The notice of proposed rulemaking for these industrial categories called to the attention of all interested parties that "effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources [are] set forth in tentative form" as proposed rules by the EPA for the named subcategories of the particular industry.^{8/} The notices explicitly stated that the rules were being proposed pursuant to Section 301 (effluent limitations), Section 304(b)

^{7/} Intervenor's twist this clear definition trying to prove that effluent limitations do not involve regulations and that effluent limitations must be set by the Federal Government in conjunction with the States, i.e., in permits. (Int. Br. at 34-36.) This distortion ignores the legislative history (S. Rept. 92-414, Leg. Hist. 1495) and attempts to have this Court amend the definition to read "Any restriction established by a State or the Administrator in a discharge permit..." States clearly can establish effluent limitations by regulation, Section 510, 33 U.S.C. §1370, as the Federal Government can pursuant to Section 301(b). Congress explicitly distinguished the effluent limitations established pursuant to Section 301 and permits issued under Section 402. See Section 505, 33 U.S.C. §1365, especially subsection (f).

^{8/} Since the material here being discussed appeared in essentially identical form in each of the nine sets of regulations at issue in this case, only the Federal Register citations relating to the Nonferrous Metals Manufacturing Point Source Category will be cited for purposes of example.

and (c) (guidelines for effluent limitations), Section 306(b) (standards of performance for new sources), and Section 307(c) (pretreatment standards for new sources).^{9/} The notices then summarized the relevant statutory provisions. See, e.g., 38 Fed. Reg. 33170.

All interested parties, therefore, were put on notice that the proposed regulations would not only satisfy the statutory requirement of Section 304(b) for guidelines for effluent limitations, but also would carry out the Congressional mandate that effluent limitations be promulgated under Section 301(b). The legislative history of Section 301 will be discussed below in subsequent pages. This history refutes the Chemical Industry Intervenors distortion of Section 301 which asserts that this section does not empower the EPA to establish effluent limitations by regulations.

But even without the repeated mention of its reliance on Section 301 in the proposed rulemaking, all but the willfully blind should perceive that the regulations for these categories

^{9/} Intervenors assertion that "no one commented on the proposed regulations in the expectation that . . . they were in fact 'limitations' . . ." is patently false as is shown by their own comments which are attached as Addendum 1. These comments show that as far back as June of 1973 Intervenors were aware of Respondent's position on the application of the limitations and were trying to dissuade the Agency from that approach.

fall clearly within the statutory definition of effluent limitations of Section 502(11). Throughout these proposed regulations are restrictions on quantities, rates and concentrations of chemicals discharged from these point sources into navigable waters, the definition of effluent limitations. See, e.g., 38 Fed. Reg. 33181-33183.

These final regulations which are challenged in the present suit, were promulgated as effluent limitations (Section 301(b)) as well as guidelines for effluent limitations (Section 304(b)). "This final rulemaking is promulgated pursuant to Sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act." See, e.g., 39 Fed. Reg. 12822. Sections 301 and 304(b) and (c) are again mentioned as authority for the promulgated regulations. See, e.g., 39 Fed. Reg. 12825. The regulations themselves again demonstrate that they come within the statutory definition of effluent limitations.

The EPA, therefore, has proposed and promulgated effluent limitations, as authorized by Section 301 of the Act. Under Section 509(b)(1) this Court has exclusive jurisdiction to review these effluent limitations.

The review process established in Section 509(b) clearly reflects the purpose of Congress to bring the provisions of the FWPCA into effect as expeditiously as possible in an orderly fashion. By vesting exclusively in the courts of appeals the responsibility to review directly the EPA's action in promulgating effluent limitations, Congress sought by prompt direct review to maintain the integrity of the time sequences of the Act. S. Rept. No. 92-414, Leg. Hist. at 1503. Piecemeal litigation in the district courts concerning the Administrator's actions in promulgating effluent limitations and effluent limitations guidelines would entirely frustrate that Congressional purpose.

Therefore, this Court should reject the Chemical Industry Intervenors' attempt to divert this litigation into the district courts where the ultimate effects would be delay and disorder. No district court has power, under Article III of the Constitution, to hear these cases. This Court should be able to pierce the Intervenors' strategy of seeking district court review and conclude, as did the Tenth Circuit in a similar case involving EPA-proposed regulations under the Clean Air Act, that "the only effect of this action is to frustrate the administrative proceedings and to intrude on the court of appeals' function." Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1304 (1973).

B. Since the guidelines for effluent limitations promulgated under Section 304(b) of the Act, 33 U.S.C. §1314(b), are inextricably related to the Section 301 effluent limitations, the Administrator properly promulgated both together and this Court should review Section 304(b) effluent guidelines as ancillary to its review of the 301(b) effluent limitations. - By Section 304(b) of the Act, 33 U.S.C. §1314(b), Congress ordered the EPA, within one year of enactment, to publish guidelines for effluent limitations.^{10/} Congress specified the purpose of these guidelines as facilitating the process of adopting or revising effluent limitations under Section 301 (additional proof that effluent limitations are to be promulgated). These Section 304(b) guidelines must identify the characteristics of pollutants and the amount of reduction attainable through application of the Section 301 tests. The guidelines must also specify the factors considered in establishing effluent limitations. The language of Section 304(b) indicates its close relationship to Section 301 effluent limitations:

^{10/} The Intervenor's rely on a district court decision, Natural Resources Defense Council, Inc. v. Train, Civil No. 1609-73 (D.D.C.). (Int. Br. at 23-24.) The NRDC decision states what the EPA has never questioned, that the regulations promulgated in the present case are Section 304(b) guidelines for effluent limitations. However, they are also effluent limitations promulgated pursuant to Section 301(b), a point simply not discussed in the NRDC decision.

For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall -

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 304 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

The Act itself clarifies the relationship between Section 301 and Section 304(b). Section 304(b) gives content to the statutory norms of Section 301(b). Section 301(b) states

that by 1977 effluent limitations "shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act," and by 1983 effluent limitations "shall require application of the best available technology economically achievable . . . determined in accordance with regulations issued by the Administrator pursuant to Section 304(b)(2) of this Act."

Section 304(b) guidelines, therefore, are intricately intertwined by the Act itself with the effluent limitations Congress required by Section 301(b). This close relationship intended by Congress will be more fully explored in the discussion of legislative history in subsequent pages.

Since 304(b) guidelines are merely definitional of the statutory norms for Section 301(b) effluent limitations, the EPA proposed and promulgated both together. Perhaps they could have been separated; however, EPA chose not to do so. Courts must show great deference to the interpretation given a statute by the official charged with its administration. Udall v. Tallman, 380 U.S. 1, 16 (1965); see also United States v. City of Chicago, 400 U.S. 8, 10 (1970); Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971); Ehlert v. United States, 402 U.S. 99, 105 (1971).

Since this Court certainly has jurisdiction, exclusive of any district court, to review the Section 301(b) effluent limitations promulgated by the EPA, and since the Section 304(b) guidelines are, by Congressional intention and agency implementation of the Act, intimately interrelated with the Section 301(b) effluent limitations, this Court should take jurisdiction over the issue raised challenging the Section 304(b) guidelines as ancillary to its determination of the challenges, clearly before this Court, to the Section 301(b) effluent limitations. Duplication of judicial review of essentially the same contentions would result if the district court were allowed to hear that aspect of this case dealing with the Section 304(b) guidelines for effluent limitations while this Court reviews the identical record to determine the validity of the Section 301(b) effluent limitations.

Delay would surely result from such a bifurcation of one suit involving the various limitations, standards and guidelines for the same industry. Besides delay, a bifurcation would encourage similar district court suits by other industries, undermining the integrity of the time schedules imposed by the Act. Conflicting opinions and contradictory orders to the EPA would undoubtedly result.

The Supreme Court, in Foti v. Immigration Service, 375 U.S. 217 (1963) considered a similar question of possible bifurcation of litigation because Congress had explicitly granted exclusive jurisdiction to the courts of appeals for only one facet of the agency's process. The issue there focused upon the question of whether the courts of appeals had exclusive jurisdiction, under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. §1105a(a), to review discretionary determinations of the Attorney General, relating to suspensions of deportation. Section 106(a) granted exclusive court of appeals jurisdiction only for final orders of deportation without mentioning discretionary determinations. The Supreme Court found that, as in the present case, the basic purpose behind the jurisdictional provisions was to abbreviate the process of judicial review in order to frustrate the dilatory court tactics of those trying to forestall deportation. (375 U.S. at 224.) The Court found that the key feature of the Congressional scheme of judicial review was to eliminate the previous initial step in obtaining judicial review, i.e., suit in the district court. Review was restricted, as here, to the courts of appeals, subject only to the certiorari jurisdiction of the Supreme Court (375 U.S.

at 225.) Bifurcation of the suit would mean that an alien could appeal only the deportability finding to a court of appeals and had to seek review of a denial of suspension in a district court.

(375 U.S. at 226.) The Supreme Court held (375 U.S. at 227):

Review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations should be made by the same court at the same time.

The Court found nothing anomalous in the fact that a change in the administrative regulations could effectively broaden or narrow the scope of review available in the courts of appeals. (375 U.S. at 229-230.) The concluding rationale of the court is as applicable to the present case as it was in Foti, 375 U.S. at 232:

We believe that the controlling intention of Congress, in enacting §106(a), was to prevent delays in the deportation process by vesting in the Courts of Appeals sole jurisdiction to review "all final orders of deportation." . . . Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language.

This Court, therefore, should take jurisdiction to review the challenges to the Section 304(b) guidelines for effluent limitations as ancillary to its exclusive jurisdiction over the questions to the Section 301(b) effluent limitations. Every polluter would like to delay the effective date of pollution

standards and limitations. This Court can shut off one avenue of delay by concluding that it has exclusive jurisdiction in this case.

C. Congress intended to authorize the Administrator to promulgate effluent limitations under Section 301 of the Federal Water Pollution Control Act and to consider the Section 304(b) effluent guidelines as intimately related to and definitional of these effluent limitations.

This review of the legislative history of Sections 301 and 304 could be eliminated if it were not for the incredible distortion of the Act by the Intervenor (Int. Br. at 28-29). They contend:

The language of the Act and the regulatory scheme it establishes demonstrate that the Administrator has no power to establish effluent limitations by regulation.

Section 301(b) only requires that effluent limitations based on technology defined by EPA in the guidelines be achieved, not that effluent limitations be independently established and achieved. [Original emphasis.]

Congress explicitly and in broad terms authorized the Administrator to promulgate regulations which are necessary and proper to carry out his responsibilities under the Act. (Section 501(a), 33 U.S.C. §1361(a)):

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

Courts have interpreted such rulemaking authority liberally to facilitate agency policymaking by regulation even where an agency's main statutory means of enforcement is by adjudicatory hearing. See National Petroleum Refiners Assoc. v. F.T.C., 482 F.2d 672 (C.A.D.C., 1973) and the cases cited therein. Even without considering the legislative history of the Federal Water Pollution Control Act, this Court, therefore, should reject the interpretation the Intervenors seek to impose in Section 301(b). Any industry regulated by a Federal agency would appreciate the opportunity to emasculate the agency by undermining its regulatory powers.

But here the legislative history demonstrates that Congress foresaw and intended that the Administrator could implement Section 301(b) by regulations establishing effluent limitations.

The silence of the Chemical Industry on the legislative history of the Act is understandable. Not one word of it, if read in context, supports their preposterous contention. Common sense might have suggested that effluent limitations could hardly be achieved if they are never established as standards to be achieved.

Because of this contention by the Chemical Industry, it will be necessary to trace the Federal Water Pollution Control Act of 1972 through Congress to demonstrate the Congressional understanding of Sections 301 and 304(b).

In the original Senate Bill, S. 2770, reported October 28, 1971 (Leg. Hist. at 1608-1610), Section 301(b) differed in several respects from the final Act: effluent limitations applying the best practicable control technology currently available, as defined pursuant to Section 304(b) would have to be achieved by January 1, 1976, and effluent limitations requiring elimination of discharge of pollutants (unless compliance were shown to be unattainable at a reasonable cost), would have to be achieved by January 1, 1981. The final form of Section 304(b) remains unchanged except for some additional factors listed in subsections 304(b)(1)(B) and (b)(2)(B) added by the House to be taken into account by the EPA.

The Senate Report, 92-414, on this Bill described the two-phase program "for applying effluent limits" in Section 301(b), the first based on best practicable technology, "to be implemented by 1976," and the second based on best available technology with a goal of no-discharge, "to be implemented by 1981." (Leg. Hist. at

1426.) Instead of continued reliance on water quality standards, under this Bill "the basis of pollution prevention and elimination will be the application of effluent limitations." (Leg. Hist. at 1426.) The clear implication is that effluent limitations must be established so that a norm would exist which could be achieved. Once effluent limitations have been established, the Section 301 program will be applied to individual point sources through the Section 402 permit program. Again the Senate Report implies that the EPA must establish effluent limitations under Section 301(b) to provide a basis for their application through the permit program (Leg. Hist. at 1460):

The program proposed by this Section [301] will be implemented through permits issued in Section 402. The Administrator will have the capability and the mandate [by promulgating effluent limitations] to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second.

Subsequent to these passages, which imply that the EPA will establish effluent limitations, the Senate Report becomes more explicit. The EPA must specify "clear and precise effluent limitations" pursuant to Sections 301(b) and 304(b). Leg. Hist. at 1468. Section 301 contains a mandate for the EPA to set effluent

limitations. The guidelines of Section 304(b) define the effluent limitations required by Section 301(b). The effluent limitations are to be imposed as conditions for permits for individual sources under Section 402.^{11/} In discussing the definitional sections of the

11/ Leg. Hist. at 1468-1469. The relevant passages of the Senate Report are:

It is the Committee's intention that pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator will interpret the term "best practicable" when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by January 1, 1976. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, the size, and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level.

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Subsection (b) of this section requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402. These guidelines would identify what constituted the "best practicable control technology currently

Bill, Section 502(d), which became Section 502(11) of the Act, the Senate Report is just as explicit in insisting that effluent limitations be "control requirements," i.e., "specific requirements," which can only mean limits established by regulations. The Report on this subsection states (Leg. Hist. at 1495):

A definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance.

In the debate on S. 2770 Senator Bentsen, a member of the Committee which drafted the Bill, was even more explicit in stating that the EPA must promulgate regulations establishing

Footnote 11 Continued

available" and the "best available control measures and practices," and the degree of effluent reduction attainable through the application of each. Thus, these guidelines would define the effluent limitations required by the first and second phases of the program established under section 301. In addition, the Administrator would identify control measures and practices available to eliminate the discharge of pollutants from any category of point sources, to allow the full implementation of the objectives of the Act.

effluent limitations pursuant to Section 301(b). He said (Leg. Hist. at 1283):

The national program which the committee has created, and which the distinguished Senator from Maine has described, would be carried through two distinct phases of execution. Both these phases, and the general objectives of the bill, are tied to specific time deadlines and carefully defined targets. In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1976, which comply with specifically defined levels of effluent control and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304, these 1976 goals shall be at least secondary treatment for publicly owned treatment works and the "best practicable control technology currently available" for other point sources--and in all events shall be those levels of treatment or control which comply with previously adopted State or Federal water quality or effluent control laws and regulations. [Emphasis added.]

Senator Muskie likewise showed that the Senate understood Section 301(b) as allowing the EPA to establish regulations setting effluent limitations. He spoke of the "control mechanisms" of Section 301 by which the EPA "is required to set up a two-phase program for applying effluent limits." (Leg. Hist. at 1259). Senator Muskie spoke of Section 301 and 302 as "the environmental control sections" (Leg. Hist. at 1388) implying established limits to be achieved. These environmental controls of Section 301(b) are

to be applied to individual point sources through the permit program of Section 402. (Leg. Hist. at 1391).

The House introduced H.R. 11896 on November 19, 1971. Section 301(b) and Section 304(b) were only slightly modified to require the consideration by the EPA of the environmental impact of the 1981 effluent limitations (House, Section 301(b)(2)(A)) and the specification of several additional factors to be evaluated under House, Section 304(b)(1)(B), i.e., "the economic, social, and environmental impact of achieving such effluent reduction, foreign competition" and other factors. (Leg. Hist. at 962-963, 979-982).

The House Report, 92-911, again demonstrates the understanding of Congress that effluent limitations would be established, obviously by EPA regulations. In discussing the relationship between the Section 301 effluent limitations and the Section 303 water quality standards, the Report shows the implicit interpretation of Congress that limitations must be set (Leg. Hist. at 788-789):

Even though section 301(b)(1)(A) and (B) requires the setting of effluent limitations consistent with best practicable control technology currently available, the Committee intends that if the sum of the discharges from point sources meeting such effluent limitations would preclude the meeting of water quality standards

in existence on the date of enactment of the 1972 Amendments, or those promulgated pursuant to section 303, new and more stringent effluent limitations would have to be established consistent with such water quality standards.

Clearly, the House is not here thinking of limitations established in individual permits. This same House Report stated, what is obvious from the Act, that permits can be issued only on the condition that the discharge will meet "all the applicable requirements of section 301," (i.e., effluent limitations established by the EPA) and other sections listed in the Act (Leg. Hist. at 812, see also page 761).

In the House debate on H.R. 11896 the effluent limitations of Section 301 are referred to as "discharge controls" (Leg. Hist. at 580). Permits issued under Section 402 must be consistent with "the specific requirements of the Bill, including [Section 301] effluent limitations" (Leg. Hist. at 578). These Section 301 effluent limitations are spoken of as standards which all point sources must meet. (Leg. Hist. at 466.) Clearly, the House had no doubt that under Section 301(b) EPA would promulgate regulations establishing effluent limitations.

The Administration, speaking through EPA officials, endorsed the effluent limitation provisions of Section 301 precisely because it gave the Federal officials the power to regulate

effluent discharges. The EPA supported the key provisions of Section 301 because (Leg. Hist. at 842, see also pages 149, 1197):

We believe that the establishment of effluent limitations, that is, a direct address to the quality and quantity of the effluent is the key ingredient. We need clear authority to regulate effluent sources directly.

None of the House amendments altered this aspect of the Bill. The Conference Report, S. 92-1236, presented to the Senate explicitly stated once again that the Act allows the EPA to establish effluent limitations to be achieved by 1977. The Report stated (Leg. Hist. at 169):

It is the intention that pursuant to subsection 301(b)(1)(A) and Section 304(b), the Administrator will interpret the term "best practicable" when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by July 1, 1977.

Other language in the Conference Report likewise leads to the conclusion that the EPA can establish effluent limitations. (Leg. Hist. at 302-304, 308, 321.)

In discussing the requirement for studies concerning thermal discharges under Section 104(t), 33 U.S.C. §1254(t), Congressman Wright spoke of the requirements of Section 301, again

indicating that EPA could promulgate regulations under Section 301(b) (Leg. Hist. at 264):

The Administrator should consider the results of these studies in promulgating regulations not only under section 316 but also under other sections of the act where thermal discharges may be regulated, including section 301 on effluent limitations, section 303 on water quality standards, and section 306 on new source performance standards.

The Senate debate, finally, makes clear the Congressional intention to have the EPA promulgate regulations establishing effluent limitations. Senator Tunney, for example, stated (Leg. Hist. at 209):

The agreement reached by the conference provides for the continuation of water quality standards already in existence, plus limitations on the amount of effluents plants may discharge into any of the Nation's waters. In every case, the effluent limitations must be sufficiently stringent to maintain the quality of the water as prescribed by the standards, but effluent limits will be a minimum measure of compliance. This procedure is essential, for it allows the Administrator to require the best control technology without having to provide a direct relationship between water pollution and water quality. Effluent limits, therefore, allow for swifter action in the fight against water pollution.

(See also, Leg. Hist. at 181, 216.)

The legislative history, therefore, demonstrates that Congress expected the EPA to promulgate by regulations the effluent limitations required by Section 301(b) to be achieved by July 1, 1977 and July 1, 1983. This history also places in proper perspective the Section 304(b) guidelines for effluent limitations which were meant to clarify the meaning of "best practicable" and "best available" in Section 301(b). (Leg. Hist. at 170-172, 181-182.)

The Administrator, therefore, has explicit authority to implement the Act through regulations. Section 501(a), 33 U.S.C. 1361(a). Furthermore, the legislative history indicates that Congress anticipated that the EPA would implement Section 301(b) by promulgating regulations. Congress intended the Agency to have the authority to establish effluent limitations. Additionally, the Act on its face provides for jurisdiction in this Court to review the Administrator's actions regarding the subject regulations.

Intervenors' tortured self-serving interpretation of the Act is clearly incorrect. Acceptance of Intervenors' contention that EPA has no power to establish effluent limitations by regulation and that jurisdiction in the instant case does not lie in this Court would have a substantial adverse effect impact upon the effectiveness of the 1972 Amendments. Intervenors' position, therefore, must be rejected.

II

A LIMITED PROVISION FOR MODIFICATION
OF EFFLUENT LIMITATIONS IN UNUSUAL
CIRCUMSTANCES IS CLEARLY CONSISTENT
WITH THE REGULATORY SCHEME OF THE
FEDERAL WATER POLLUTION CONTROL ACT

The development of the limitations and guidelines called for by Sections 301 and 304 of the Act is a staggering task, in volume and in complexity. Any attempt to identify and classify American industry in all its diversity giving due consideration to the extensive variables among the plants which necessarily affect the type and amount of pollutants discharged, as well as the capability to control such discharges (e.g., process employed, age and location of plant, product produced) presents an almost overwhelming administrative burden. Respondent recognizes that the Act calls for the Environmental Protection Agency to promulgate national regulations that will identify effluent limits for categories of point sources which can then be applied to individual discharges through permits issued pursuant to Section 402 of the Act.^{12/} Petitioner and Respondent are in agreement on the

^{12/} In a separate action brought by Petitioners, a district court held that Section 304(b) guidelines must be promulgated for all point sources no later than November 29, 1974. NRDC v. Quarles, 6 ERC 1033 (D.D.C. 1973). EPA is appealing that decision on the issues of the time for promulgation and the necessity for all point sources being covered. C.A.D.C., Civ. No. 74-1433.

basic scheme of the Act, and at odds with Intervenor's as discussed in Section I of this brief. The sole issue upon which there is disagreement is whether there is any flexibility which can be included in those regulations to prevent unanticipated, unreasonable impacts of these regulations. It is Respondent's position that there is such flexibility in the regulatory scheme.

Respondent's approach to developing guidelines and limitations under Sections 301 and 304, as well as new source performance standards and pretreatment standards under Sections 306 and 307(b) and (c), involved, initially, a breakdown of point source dischargers into general industrial categories, using as a starting point the Congressional industrial categorization set forth in Section 306(b)(1)(A). Within each category, subcategories were identified based upon products manufactured, process employed, size of facilities, etc. For the initial 30 industrial categories, over 180 subcategories were established in order to group together similarly situated plants. With the assistance of contractors, each industry was reviewed and analyzed to ascertain the status of pollution control in the industry and other pertinent characteristics which might affect the level of effluent reduction which the industry was capable of achieving by 1977. Plants were visited,

literature was reviewed, and experts were consulted. An enormous volume of information has been gathered including hundreds of thousands of pieces of data relating to present discharge levels. Obviously, it was not possible to visit or receive information from every plant, and certain assumptions regarding common industry characteristics were sometimes necessarily made. Based upon this information the Agency proposed and, after allowing public comment, promulgated specific limitations to be applied uniformly to all facilities falling within a particular subcategory.

In the public comments on the regulations, one of the most frequent criticisms of the regulations was their inflexibility and consequent inability to accommodate individual circumstances not properly considered and taken into account during the development of the regulations. Because of these comments and in recognition of the necessarily incomplete survey of each possible permit applicant, the Agency determined that some provision should be included in the regulation to deal with such situations should they arise during application of the limitations, i.e., at the time of permit issuance. The approach chosen--a procedure for modification of the limits upon a showing that the particular facility had characteristics fundamentally different from the factors considered in the development of the regulation--is at issue here.

Allowing such a limited modification of the regulations is consistent with the requirements of the Act. Petitioner's contentions can be condensed into one basic objection, viz, that the Congress required uniformity through issuance of national regulations that could be applied without exception at the time of permit issuance and precluded individualized determinations of effluent limits. According to Petitioner, any deficiency in the characterization and coverage of a subcategory should be handled through a change in the regulation, not through a "variance" (Pet. Br. at 42).

Respondent agrees that the primary emphasis in the 1972 Amendments is uniformity and that the establishment of specific national limitations is essential to effectuate Congressional intent that "similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." (Leg. Hist. at 192 - remarks of Senator Muskie). The importance of uniformity was stressed even more when Senator Muskie indicated that uniformity was one of three essential elements to the conference agreement and without which the agreement would not have been brought to the floor. (Leg. Hist. at 162). Petitioner has referenced other clear

statements in the legislative history citing the desire for uniformity and the necessity for such uniformity to the successful implementation of the scheme of the Act, so it is not necessary to repeat those references here.

While speaking clearly on the issue of uniformity, Congress also recognized the difficulties in prescribing absolute uniform limitations. Senator Muskie indicated the intent was that the limitations "within any given class or category be as uniform as possible." (Emphasis supplied.) (Leg. Hist. at 172). Congressman Clausen, one of the conferees, made clear the qualifications on the uniform application of limitations when he observed during the debates on the House bill that the standard "would be applied to all plants of a similar nature, regardless of location, if the applicable factors . . . were the same in each plant." (Emphasis supplied.) (Leg. Hist. at 378.) Despite extensive subcategorization and rigorous analysis of the various industries, the diversity of industry and the variation among plants within industry categories make it a virtual certainty that there will be some instance where the Agency's consideration of those factors will not have contemplated a set of circumstances that clearly indicates that the plant is not "similarly situated" with other plants in the category and thus

should not be regulated in the same manner. While Respondent believes such occurrences will be minimal, the possibility demands that some provision be made to deal with the problem.

The modification provision included by Respondent in these regulations was not therefore an attempt to subvert the uniformity which EPA concedes the Act requires, but was in fact an attempt to reconcile the call for uniformity with the limitations inherent in the process of developing uniform limitations, which Congress also recognized. The modification provision is narrowly drawn; it is applicable only where an applicant shows that there are factors affecting his ability to meet the limits which are "fundamentally different from the factors considered in the establishment of the guidelines." 39 Fed. Reg. 12826. In view of the extensive industry analysis undertaken in developing the regulations and the substantial opportunity provided industry to comment on the regulations and the underlying analysis, it is unlikely that there will be very many instances where the procedure will have to be invoked. Yet, in those instances, it provides a reasonable mechanism to deal with situations which would otherwise compromise the effectiveness and validity of the regulations and where Congress clearly did not envision a plant would be considered similar to the

other facilities in the subcategory. Such an approach is certainly more reasonable than reopening the rulemaking to consider the particular situation, which would be cumbersome and an inefficient use of time.

There are several distinct reasons why this provision is clearly legal under the Act. First, as discussed above, it does not debilitate the Act's scheme for uniform application, which is Petitioner's only real objection. Second, there is nothing in the express language of the Act which proscribes inclusion of such a procedure in the regulations. The Administrator is given broad discretion in setting the degree of reduction attainable by point sources and, in addition to specified factors, can consider "such other factors as [he] deems appropriate." Section 304(b)(1)(B). Certainly the potentiality of a uniquely situated source which should be dealt with separately is an additional factor and can best be administered through a mechanism such as this modification procedure.

Finally, the inclusion of "safety valves" in regulatory schemes of general applicability has been consistently sustained as being an appropriate element in the regulatory process. Perhaps the most succinct recognition of this principle was articulated

by the Supreme Court in United States v. Allegheny Ludlum Steel Corp., 406 U.S. 742 (1972). In reviewing an action of the Interstate Commerce Commission the Court observed:

The Commission, acceding to the arguments of shippers and railroads on rehearing, agreed that mandatory total compliance with the rules promulgated would be impossible in view of the tremendous number of units involved and, accordingly, a procedure by which exceptions might be applied for was established. How the provision for exceptions will be administered in practice is a matter about which we could only speculate at present. It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. Permian Basin Area Rate Cases, 390 U.S. 747, 784-786. [406 U.S. at 755.]

This is particularly pertinent to this situation which is also a new and complex area of regulation.

The appropriateness of a modification procedure has also been recognized in other instances of environmental regulation. In Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (C.A.D.C., 1973), new source performance standards promulgated by EPA under Section 111 of the Clean Air Act were under review. In discussing a proposed revision of the regulation to allow for variances under certain circumstances, Judge Leventhal commented that the new provision

[i]n some sense . . . imparts a construction of "reasonableness" to the standards

as a whole and adopts a more flexible system of regulation than can be had by a system devoid of "give." As we noted in International Harvester, supra, a regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case can lend strength to the system as a whole. "The limited safety valve permits a more rigorous adherence to an effective regulation." At 437 of 155 U.S. App. D.C., at 641 of 478 F.2d quoting from WAIT Radio v. FCC, 135 U.S. App. D.C. 317, 323, 418 F.2d 1153, 1159. 486 F.2d 399.

See also, U.S. v. Storer Broadcasting Co., 351 U.S. 192, 201-02, 204-05 (1956); Essex Chemical Corp. v. EPA, 486 F.2d 427, 433 (C.A.D.C., 1973); Amoco Oil Co. v. EPA, 6 ERC 1481, 1442-43 (C.A.D.C., 1974). Similarly, this modification procedure, which provides for unusual, unanticipated situations, is also an appropriate part of the effluent guidelines and standards regulatory scheme under Sections 301 and 304; its existence supports, rather than frustrates, that regulatory system. Clearly, its validity should be sustained.

Because of the different views of the approach in the Act being expressed by the three parties to this action, it is appropriate to reemphasize the fact that Respondent, as a general matter, agrees with the interpretation of the Act espoused by Petitioner and disagrees with that advanced by Intervenor. These regulations are uniform effluent limitations which are to be applied uniformly to plants falling within the particular subcategory.

The modification or "variance" clause is only a narrow exception to that general rule of applicability and will be applied by EPA with restraint. It will not be available to a discharger who merely disagrees with the Agency's consideration of factors and its conclusions as they relate to his particular circumstance. It is only to be invoked where particular factors were not considered by the Agency at all or the particular factors are so unique or distinctive that they clearly require independent consideration, and when such factors have direct bearing on the plant's ability to reduce effluent discharges. It should also be noted that Respondent has already determined that the economic impact of the effluent limitations on an individual plant is not a factor that falls within the scope of this procedure. In view of the limited nature of the provision and the other considerations discussed above, Petitioner's objections are clearly without merit and that Respondent's actions should be sustained.

CONCLUSION

For the foregoing reasons, the action of the Administrator should be affirmed, and the petition for review should be dismissed.

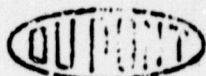
Respectfully submitted,

WALLACE H. JOHNSON,
Assistant Attorney General.

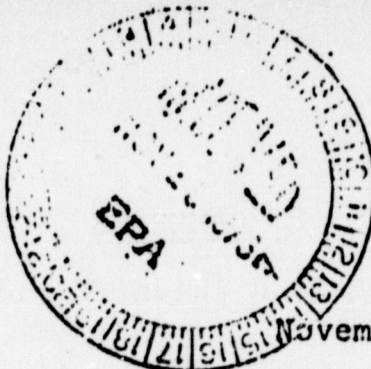
EDMUND B. CLARK,
MARTIN GREEN,
HENRY J. BOURGUIGNON,
RAYMOND W. MUSHAL,
Attorneys, Department of Justice,
Washington, D.C. 20530.

G. WILLIAM FRICK,
Associate General Counsel for Water,
Environmental Protection Agency,
Washington, D.C. 20460.

AUGUST 1974



E.I. DU PONT DE NEMOURS & COMPANY
WILMINGTON, DELAWARE 19898



LEGAL DEPARTMENT

Mr. Philip B. Wisman
Information Center
Environmental Protection Agency
Washington, DC 20460

RE: COMMENTS ON THE PROPOSED REGULATIONS -
EFFLUENT LIMITATIONS AND STANDARDS OF
PERFORMANCE AND PRETREATMENT FOR INORGANIC
CHEMICALS MANUFACTURING POINT SOURCE CATE-
GORY, AND COMMENTS ON
(1) THE EPA DEVELOPMENT DOCUMENT (EPA
440/1-73/007) AND ON
(2) THE ECONOMIC ANALYSIS OF PROPOSED
EFFLUENT GUIDELINES, EPA-230/1-73-015.

Dear Mr. Wisman:

We, at Du Pont, seriously question the effluent limitations and the basis for them as set forth in the Inorganic Chemical Industry Guidelines. Not only are most of the effluent limitations for best practicable control technology and best available technology unachievable, but they are also not supported by the record as required by the Act.

Many of the conclusions drawn did not take into account the factors specified in Section 304(b) in determining the control measures and practices applied to point sources.

We agree with the attached legal position paper of MCA on the guidelines and request that EPA state that the guideline limits are not standards but are merely guidance to achieving an effluent reduction which is technologically and economically feasible.

We find few areas in which we concur conceptually with EPA. One of them is item (6) on page 28180 where EPA states that, except for those considered harmful, dissolved solids should not be limited. We interpret this to mean that dissolved solids do not fall within the term "process waste water pollutants." However, EPA did not clarify this point in the definitions for "process waste waters" in Subparts A through V. We suggest that it be so defined as to exclude dissolved solids.

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F. SUBCATEGORY COMMENTS

Attachment A is an MCA legal position on the effluent guidelines.

In Attachment B are specific comments pertaining to the following Subcategories of the Inorganic Chemicals Manufacturing Point Source Category: aluminum sulfate, nitric acid, sulfuric acid, sodium silicate, hydrochloric acid, hydrofluoric acid, hydrogen peroxide and sodium metal.

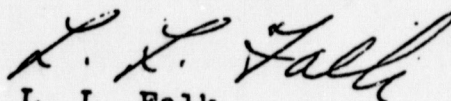
Attachment C contains specific comments on the titanium dioxide production subcategory.

Attachment D contains comments on the statistical misconception in the section of the Development Document on "Effluent Data Analysis".

Attachment E contains prior correspondence of Du Pont relative to the Development Document, final or draft.

We expect that you will give serious consideration to these and past Du Pont comments on the inorganic chemicals guidelines and standards of performance. We trust these will be helpful to EPA in developing equitable guidelines achievable by U.S. industry, yet compatible with a healthy economic environment.

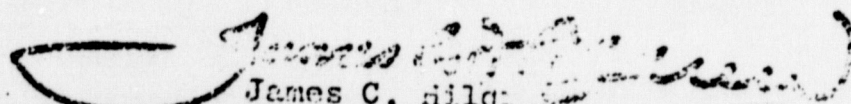
Very truly yours,


L. L. Falk

LLF/sp

CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof is being mailed on the date hereof.


James C. Hildner
Attorney for
E. I. du Pont de Nemours & Co.

RE: EPA PUBLICATION OF PROPOSED REGULATIONS
FOR INDUSTRIAL EFFLUENT LIMITATIONS GUIDE-
LINES FOR THE DISCHARGE OF POLLUTANTS TO
NAVIGABLE WATERS AND MUNICIPAL SYSTEMS

We, the members of MCA, feel the proposed EPA guidelines are not consistent with the requirements of the Federal Water Pollution Control Act Amendments of 1972.

We are concerned that the suggested effluent limitations in the guidelines go far beyond the effluent reductions, which Congress intended.

We feel that if the suggested effluent limitations are used as standards or requirements, the Administrative Procedure Act will be violated unless adjudicatory hearings are held prior to promulgation.

The Administrative Procedure Act requires that an adjudicatory hearing be held where the facts are within the knowledge or province of a few or a particular party.

Since only the discharger(s) subject to a subcategory of a guideline know whether the facts support that effluent requirements can be met, an adjudicatory hearing is mandated for subcategories where the requirements are at issue.

Davis confirmed this in Section 7.02 of his Administrative Law Treatise. He said that an opportunity for a trial should be given where adjudicative facts are:

"intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them."

Thus, it is concluded that, if pollutant loadings are considered requirements as opposed to guidance, particular parties affected by subcategory loadings can require adjudicatory hearings. These hearings will bring out the basis for imposing any such requirement on them, since the facts are within their province and apply only to them.

To prevent early litigation on the question of whether the EPA should hold adjudicatory hearings, EPA should publish the procedures EPA will follow in implementing the guidelines. Because EPA will be issuing thousands of permits, the EPA procedure should state that the documents are only to be applied with discretion as guidance. The procedure should also state that less stringent limits may be set for individual plants where the guideline effluent limitations are not achievable.

It is also suggested that EPA issue a policy directive to its Regional Offices directing them to use the limitations as a guide, allowing the Regional Office the opportunity to adjudicate with the discharger the reasonableness of achieving the load limits in the guidelines.

Furthermore, even if the effluent limitations in the guidelines are used as guidance, we question whether the guidelines were to include specific effluent limitations. Section 304(b) requires the Administrator to promulgate regulations providing guidelines, which are to be used as a tool in establishing effluent limitations. The guidelines were not intended to set forth specific effluent limitations, production based or not. Production based effluent limitations go beyond the requirements of Section 304(b).

Section 304(b) requires that the guidelines specify the level of effluent reduction attainable. Effluent reduction - not specific effluent limitations - are the basis for determining whether best practicable control technology and best available technology is achieved by classes or categories of sources. The other factors to be considered in determining the required control measures and practices necessary are set out in Sections 304(b)(1)(B) and 304(b)(2)(B).

Section 301(b)(1)(A) and 301(b)(2)(A) only provide for the administrative achievement of effluent limitations by technology. These sections do not provide that effluent limitations be set forth in the guidelines. Congress intended that a uniform system of effluent reductions be specified in the guidelines - not uniform limitations based on production.

The suggested production based effluent limitations go beyond effluent reductions which are attainable through technology under Section 304(b)(1)(A) and Section 304(b)(2)(A). There are inherent faults in the production approach which lead to in many cases far too stringent pollutant reductions. The variation in water usage and diverse process considerations cannot and are not taken into consideration in such an approach.

To further point out the unreasonableness of the effluent reductions in the guidelines, we would like to point out that Congress in the Senate Report expressed the expectation that 95 to 99% removal of pollutants be achieved by 1983. Many of the 1977 reductions are at these levels and beyond them. The Inorganics Guidelines provide for zero discharge of pollutants for 14 out of 22 product subcategories.

For guidelines which specify removal efficiencies of 95% to zero discharge by 1977, the guidelines have not specified the measures and practices to be considered under Section 304(b)(2). Even the requirements of Section 304(b)(1) have only been partly met. To require the application of best available technology economically achievable in 1977, both the requirements of best practicable control technology and best available

technology must be taken into account. The guidelines in establishing zero discharge requirements have not considered the affordability of the total cost to a particular industry of achieving zero discharge as well as the effluent reduction benefits of going to zero discharge by 1977 instead of 1983 or later.

The establishment of 1983 effluent reductions by 1977 ignores the intent of Congress of not rushing into establishing 1983 effluent limitations. Congress established the National Study Commission under Section 315 to evaluate all aspects of the total economic, social, and environmental effects of achieving or not achieving the effluent limitations and goals set forth for 1983. The NSC report must be submitted by October 18, 1975. Congress intended that there be a review of the impact of the 1983 effluent limitations before the limits are implemented. By requiring the 1983 limits to be met by 1977, EPA will not allow for an assessment of the impact of the 1983 effluent limitations prior to implementation.

The practical result of applying many of the 1977 effluent limitations is that extensive process and procedural innovations, changes in operating methods, and very substantial process changes will be necessary to meet the guidelines. Best practicable control technology currently available is defined on page 101 of the House Debate of October 4, 1972 as the:

"treatment facilities at the end of a manufacturing, agricultural, or other process rather than control technology within the process itself."

Certainly some process changes may be required by 1977 under Section 304(b)(1)(B), but very substantial changes in processing are not required until 1983 under Section 304(b)(2)(A). The guidelines for 1977 would mandate all types of process changes immediately to meet the levels of reduction.

Besides, even if process changes were required by the Act, the control technology for 1977 is not "currently available" for those processes specified. In many instances technology cannot be transferred to treat certain types of troublesome effluents. We feel that the EPA has not demonstrated that the technology is currently available with a

"reasonable level of engineering and economic confidence in the viability of the process."

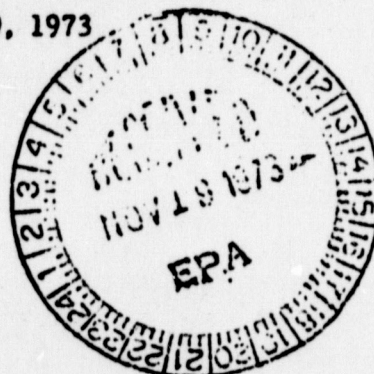
as set out on page 101 of the House Debate of October 4, 1972.

It should be further pointed out that Section 301(b)(2)(A) places the burden upon the Administrator to show that zero discharge is technologically and economically achievable. This has not been done. The guidelines fail to recognize the position taken by Mr. Ruchelshaus that the discharge of pollutants on land is not zero discharge but merely tertiary treatment. The water has to go somewhere.

CHEMICALS

180 LONG RIDGE ROAD, STAMFORD, CONNECTICUT 06904

November 9, 1973



Mr. Philip B. Wisman
EPA Information Center
Environmental Protection Agency
Washington, D. C. 20460

Re: Environmental Protection Agency
40 CFR Part 415
Effluent Limitations Guidelines and
Standards of Performance and
Pretreatment for Inorganic Chemicals
Manufacturing Point Source Category

Dear Mr. Wisman:

The following comments are submitted in connection with the proposed Effluent Limitations Guidelines (40 CFR Part 415) which were published in the Federal Register, Volume 38, Number 196, on October 11, 1973, pages 28174 through 28202.

General - Since Section 304 (b) of the Water Pollution Control Act requires the Administrator to publish regulations providing guidelines to be used as a tool for establishing effluent limitations, we recommend that the guidelines be established as a range for application in a flexible manner and not as strict standards applicable without exception throughout the industry. Olin accordingly endorses the Manufacturing Chemists Association's position relative to this matter as was stated in Mr. W. J. Driver's letter of October 17, 1973, addressed to Mr. Russell E. Train. Also, we have considerable concern regarding the pretreatment standards which essentially prohibit future industrial participation in municipal treatment facilities in that industry must apply the "best available demonstrated control technology, processes, operating technology..." prior to discharge to a municipal system.

Subpart F - Chlorine and Sodium or Potassium
Hydroxide Production Subcategory

1. Effluent limitations for 1977, Best Practicable Control Technology - The phrase "best practicable control technology currently available" was adopted by Congress as the Phase I (1977) standard. It appears from the legislative history

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that "best practicable" was intended to be a more stringent and more comprehensive standard than the so called "industry equivalent to secondary treatment," which connotes 85 to 90 percent BOD₅ removal. The requirement was to be established by reference to the average of the best performers in an industry category. Of the 28 currently operating mercury cell facilities in the United States, EPA cited two (EPA designations-130 and 144) as exemplary, and one (EPA designation-098, outside the U.S.) as provisionally exemplary in establishing the best practicable control technology. One of these (130) involves a singularly unique situation, employing potassium chloride brine (as contrasted to sodium chloride brine) as the process raw material. None of the three exemplary plants has a production capacity in excess of 300 tons per day of chlorine. However, about one-third of the existing mercury cell chlorine capacity comes from larger facilities. Moreover, EPA did not include consideration of those facilities which have older and still viable cells that are small in terms of individual cell production capacity but have the highest mercury inventory on a per ton of chlorine production basis.

Contrary to Congressional intent, EPA has based its dissolved mercury effluent limitation of 0.00014 pounds per ton of chlorine produced on the performance of one exemplary plant rather than the average of the best performers in the industry. Although this level of discharge has been achieved by the exemplary plant, it should not be adopted as a general limitation since it does not provide for variations in plant size and age, raw material selection and availability, complexity and geographic location. Therefore, Olin proposes that the dissolve mercury effluent guideline limitation definition be set in the form of a range having its high end based on an achievable mercury discharge level of 0.1 pounds per day (monthly average) and the low end representing the achievement of the above mentioned exemplary plant. This upper discharge level has been widely accepted within the EPA as representing best current technology as witnessed by issuance in 1973 of two NPDES permits at this level to Olin plants and at least two more permits to other manufacturers. Based on an average size mercury cell chlorine plant of 300 tons per day chlorine production, this equates to 0.0003 pounds of mercury per ton of chlorine produced. The recommended range would therefore be 0.00014 to 0.0003 pounds of mercury discharged per ton of chlorine produced.

Further, based on EPA values of an average of 0.15 pounds of mercury being discharged per day from the 28 existing mercury-cell facilities (.0005 lb. mercury per ton chlorine), a total of about 4 pounds per day of mercury is discharged in the United States from the chlor-alkali industry. Since these 28 facilities produce approximately 7600 tons per day of chlorine, application of the proposed EPA 1977 limitation of 0.00014 lb. mercury per ton of chlorine would reduce the total mercury effluent to 1.1 pounds per day. The concept of spending large sums of money to reduce the mercury effluent of the entire chlor-alkali industry by only three pounds per day as required in the proposed limitations is not economically or environmentally justifiable. A regulation allowing judicious application of a range of values would be much to the national benefit.

2. Effluent Limitations Guidelines for 1983 - The proposed limitation for chlor-alkali plants is "no discharge of process waste water pollutants". In specifying zero discharge EPA ignores such important factors as, spills and non-recyclable wastes, waste treatment plant failures or interruptions, and Acts of God. EPA simply states that the technology exists to reach "zero" discharge by 1983. Olin agrees that theoretically this is true, but we believe the Congress intended that the very best information be employed in examining the technology and economics of each product before establishing the regulations. This has not been done. We object strongly to the economics EPA has used to justify "zero" discharge. The EPA-recommended procedure for chlor-alkali plants to achieve "zero" discharge is sale of spent sulfuric acid, decomposition and evaporation of waste hypochlorite to reusable salt or manufacture and sale of hydrochloric acid from hypochlorite and evaporation of all other process waste water streams after mercury removal to eliminate dissolved solids. For a 175 ton per day chlorine plant, EPA estimates the additional cost for achieving zero discharge, after spending an estimated \$2.14 per ton of chlorine for best practicable treatment, to be \$.86 per ton of chlorine. The figure is more realistically an additional \$2.00 to \$3.00 per ton of chlorine. EPA gave \$50,000 as the cost of an evaporator system and \$200,000 for hypochlorite disposal. More realistic figures are \$300,000 for the evaporator (three effects required) and \$400,000 for hypochlorite control. EPA Gave electrical energy cost as \$1,000 per year and steam cost of \$5,000 per year to obtain zero discharge for a 175 ton per day chlorine plant. Olin estimates at present day power costs these figures would be \$12,000 for electric energy cost and \$48,000 for steam cost for this size plant. (Even these costs are expected to rise in the near future) These discrepancies point out the erroneous economics used to support achievement of "zero" discharge. Also, the setting of the zero discharge limitation at this time by-passes the legislative time table which provides, in Section 315 of the Water Pollution Control Act, for a National Study Commission. This Commission is to study in detail all aspects of achieving or not achieving by July 1, 1983 the goals set in Section 301 (b) of the Act (best available technology economically achievable).

Olin has estimated that it would require in excess of \$2,000,000 additional capital expenditure and \$625,000 additional operating expenditure to achieve no discharge of process waste water pollutants at its chlor-alkali facilities. This expenditure of between \$4.00 and \$5.00 of capital per annual ton of chlorine would accomplish the elimination of waste streams which are innocuous to most receiving streams. Here again is a case of establishing an unrealistic limitation which cannot be supported on an economic basis and which will have little, if any, beneficial effect on the environment. The outstanding effect of the "zero" discharge limitation will be an increase in the cost of chlorine by approximately 10%, which will be reflected in the cost of chlorine-consuming products such as plastics, paper products, textiles, etc. and in the cost of municipal waste treatment.

The cost estimates, economic impact and treatment costs to achieve the effluent reductions attainable by the application of the best practicable treatment currently available and by application of the best available treatment economically achievable have not been demonstrated. It is understandable that cost evaluations are off by a significant factor since in the EPA estimate it is acknowledged that installed costs did not include auxiliary equipment such as boilers or cooling towers, major buildings, land purchase or other costs specific to each application.

Subpart H - Hydrofluoric Acid Production Subcategory

In order to avoid generally recognized, serious air pollution problems resulting from the production of hydrofluoric acid the calcium sulfate is usually quenched by slurring in water. The slurry system will contain some impurities originating in the raw material fluorspar, calcium sulfate and fluorides. The proposed "no discharge" conceivably calls for total reuse of all process water including the above-mentioned quench water. Where impoundment and recycle are practiced, rainfall in excess of evaporation loss may preclude the recycle of all water. Olin proposes that an allowance be made for the release of excess recycle water.

Subpart U - Sulfuric Acid Production Subcategory

We believe that double absorption sulfur-burning sulfuric acid plants can meet the proposed rules for "no discharge" of process waste water pollutants. However, we strongly object to the rule that there should be no process waste water discharge from a single absorption sulfur-burning sulfuric acid plant where the plant meets air quality standards through the use of a tail gas clean up system. On page 28177 of the Federal Register it is recognized that tail gases for these sulfuric acid plants can be scrubbed and treated. On page 222 of the "Development Document for Proposed Effluent Limitations Guidelines" it is stated that SO₂ scrubber effluent should be minimized on existing installations and no waterborne wastes should be allowed from future SO₂ removal system. On page 230 of this document it states in the last paragraph that existing SO₂ control systems which discharge waterborne waste can be made wastefree by concentration and recovery of sodium sulfate which can be sold. Before Olin provided purge stream treatment of its Curtis Bay, Maryland sulfuric acid plant, the possibility of selling or even giving away the sodium sulfate was investigated. However, no customers or takers could be found.

It would appear that those plants that have pioneered in the development of pollution control technology and have installed equipment thought to be acceptable to Federal

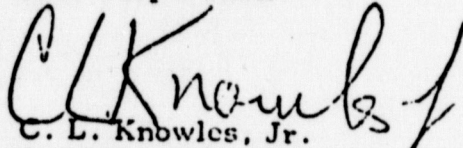
and State authorities are being penalized for this effort. Past effort to reduce pollution should not go unrecognized when the waterborne waste products resulting from these efforts are modest and are compatible with the receiving waters. The rules should be amended to permit the discharge of treated waste water from air pollution control facilities in a single absorption sulfur-burning sulfuric acid plant where pH has been adjusted and the sulfate discharge is compatible with the receiving waters.

Olin offers these objections and recommendations for change of the proposed rules hoping to affect the development of effluent limitations that offer the optimum benefits to the country both environmentally and economically.

..

Yours very truly,

Olin Corporation

A handwritten signature in dark ink, appearing to read "C. L. Knowles, Jr.", written over the typed name.

C. L. Knowles, Jr.
Director of Engineering and
Environmental Affairs

CLK/ms

8 NOV 1973

- 59 -



Inorganic Chemicals

TITANIUM PIGMENT OPERATIONS

GLENN A. WILSON
Group Vice President

REGISTERED MAIL
RETURN RECEIPT REQUESTED

November 7, 1973

U. S. Environmental Protection Agency
Information Center
Washington, D.C. 20460

Attention: Mr. Philip B. Wisman

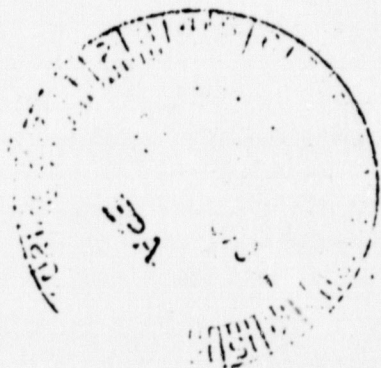
Gentlemen:

Please accept our comments in response to the Proposed Rules, published in the Federal Register October 11, 1973, establishing Effluent Limitations, Guidelines and Standards of Performance and Pretreatment for Inorganic Chemicals, Manufacturing Point Sources Category. The comments are made with reference to those sections of the Guidelines and other reference documents pertaining to the production of titanium dioxide and are detailed in the attached Exhibit A.

We believe that if the proposed Guidelines are promulgated in the present form they will have a profound adverse impact on the national economy, the titanium dioxide pigment industry, and NL Industries, Inc., Titanium Pigment Division. Our analysis of the Guidelines and supplementary Documents shows many seeming inaccuracies, false assumptions and erroneous conclusions. We respectfully urge a complete re-evaluation of these Guidelines before they are promulgated. In your re-evaluation we invite your consideration to the points set forth in the attached Exhibit A.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Glenn A. Wilson'.
GLENN A. WILSON
Group Vice President



N L INDUSTRIES, INC.
TITANIUM PIGMENT DIVISION

LAND USE POLICY (Continued)

The Development Document lists the various factors considered for best practical technology and best available technology (Pages 353 and 369). Land availability or land use policy are not listed and appear not to have been considered. Certainly these are major factors when considering either the best practical or best available technology for the reduction of liquid effluents from a titanium dioxide plant.

ENERGY CONSUMPTION

An important factor in considering the treatment technologies advocated in the Development Document is their energy consumption. The contractor has assumed energy costs and availability which seem to disregard the predictions for the period covered by the Guidelines. Neutralization processes require energy for grinding and mixing of reactants, and for filtering and transport of sludges to a landfill site. Energy is required for the production of lime or other neutralizing agents. Other processes discussed by the contractor, such as demineralization, multi-effect evaporation, and acid concentration all have their own energy demands, some of them very high. We have estimated, for example, that one acid recovery process requires about one ton of fuel oil in order to recover one ton of sulfur contained in the concentrated acid. This consumption of an increasingly scarce resource, oil, to recover one ton of widely available and inexpensive sulfur is not in the national interest.

GUIDELINE FLEXIBILITY

The Proposed Guidelines are blanket rules which fail to take into account unique features at individual existing plants. Some plants have no land available for landfilling; indeed, some may not have the land necessary for the construction of the treatment facilities that would be required. Other factors not taken into account are the age, location, water supply, and product mix of the plants. For example, one of the N L plants produces non-pigmentary TiO_2 . This is a unique product, for the glass and ceramic industries. The process yields dilute effluents that

N L INDUSTRIES, INC.
TITANIUM PIGMENT DIVISION

GUIDELINE FLEXIBILITY (Continued)

would be uniquely expensive to treat. Further, the existing process equipment at this plant yields dilute effluents not suitable for acid recovery. The best practical technology is not the same for all plants because of limitations imposed by the unique and peculiar factors of each plant.

The Guidelines should be flexible with consideration given to the numerous plant by plant exceptions to the "model plant" used by the contractor.

LACK OF DEMONSTRATED CONTROL TECHNOLOGY

The technology required to achieve the low Guideline levels has not been demonstrated on TiO_2 plant effluent streams. The contractor has assumed the successful transfer of technology from other processes, an assumption that remains to be proven viable. The Development Document states (Abstract, Page iii, 2nd paragraph): "The standards of performance and pretreatment standards for new sources contained herein set forth the degree of effluent reduction which is achievable through the application of the best available demonstrated control technology,....." No control technology has been demonstrated that would enable TiO_2 manufacturing plants to meet the Proposed Limitations, Guidelines, and Standards of Performance published October 11, 1973.

COSTS AND COST BENEFIT

Costs are one of the most important, and one of the most difficult factors to be evaluated, yet the technologies must be "economically achievable." We believe the costs in the Development Document to be low by a factor of two to four. More specifically, the costs for neutralization at an N L sulfate plant were recently estimated by a consulting organization at \$142/ton of product as compared to the EPA contractor's estimate of \$82/ton of product. Even at this cost, the treatment would not meet the Proposed Guideline limits.

MANUFACTURING CHEMISTS ASSOCIATION

1825 CONNECTICUT AVENUE, N. W. WASHINGTON, D. C. 20009 (202) 483-6126

WILLIAM J. DRIVER
PRESIDENT

November 12, 1973

Honorable Russell E. Train
Administrator
U. S. Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Dear Mr. Train:

This letter is in support of our October 17, 1973 recommendation that the Agency's effluent limitations program be redirected.

We believe that the proposed EPA effluent guidelines are not consistent with the requirements of the Federal Water Pollution Control Act Amendments of 1972 and that the proposed effluent limitations in the guidelines go far beyond the effluent reductions which Congress intended.

We also believe that if the suggested effluent limitations in the guidelines are adopted and used as standards or requirements by the EPA's Regional Offices, the regulations will violate the Administrative Procedure Act.

The Administrative Procedure Act requires that an adjudicatory hearing be held where the facts are within the knowledge or province of a few or a particular party. Since only the discharger(s) subject to a subcategory of a guideline know whether the facts support that effluent requirements can be met, an adjudicatory hearing is mandated for subcategories where the requirements are at issue.

Davis confirmed this in Section 7.02 of his Administrative Law Treatise. He said that an opportunity for a trial should be given where adjudicative facts are:

"intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them."

Honorable Russell E. Train

Page two

November 12, 1973

Thus, it is concluded that, if pollutant loadings are considered requirements as opposed to guidance, particular parties affected by subcategory loadings can require adjudicatory hearings. These hearings will bring out the basis for imposing any such requirement on them, since the facts are within their province and apply only to them.

To prevent early litigation on the question of whether the EPA should hold adjudicatory hearings, EPA should publish the procedures EPA will follow in implementing the guidelines. Because EPA will be issuing thousands of permits, the EPA procedure should state that the documents are only to be applied with discretion as guidance. The procedure should also state that less stringent limits may be set for individual plants where the guidelines effluent limitations are not achievable.

It is also suggested that EPA issue a policy directive to its Regional Offices directing them to use the limitations as a guide, allowing the Regional Office the opportunity to adjudicate with the discharger the reasonableness of achieving the load limits in the guidelines.

Furthermore, even if the effluent limitations in the guidelines are used as guidance, we question whether the guidelines were intended to include specific effluent limitations. Section 304(b) requires the Administrator to promulgate regulations providing guidelines, which are to be used as a tool in establishing effluent limitations. The guidelines were not intended to set forth specific effluent limitations, production-based or not. Production-based effluent limitations go beyond the requirements of Section 304(b).

Section 304(b) requires that the guidelines specify the level of effluent reduction attainable. Effluent reductions -- not specific effluent limitations -- are the basis for determining whether best practicable control technology or best available technology is achieved by classes or categories of sources. The other factors to be considered in determining the required control measures and practices necessary are set out in Sections 304(b)(1) (B) and 304(b)(2)(B).

Honorable Russell E. Train
Page three
November 12, 1973

Sections 301(b) (1) (A) and 301(b) (2) (A) only provide for the administrative achievement of effluent limitations by technology. These sections do not provide that effluent limitations be set forth in the guidelines. Congress intended that a uniform system of effluent reductions be specified in the guidelines -- not uniform limitations based on production.

The suggested production-based effluent limitations go beyond effluent reductions which are attainable through technology under Section 304(b) (1) (A) and Section 304(b) (2) (A). There are inherent faults in the production approach which lead to far too stringent pollutant reductions in many cases. The variation in water usage and diverse process considerations are not taken into consideration in such an approach.

To further establish the unreasonableness of the effluent reductions in the guidelines, we would like to point out that Congress in the Senate Report expressed the expectation that 95 to 99% removal of pollutants be achieved by 1983. Many of the 1977 reductions are at these levels and beyond them. The Inorganic Guidelines provide for zero discharge of pollutants for 14 out of 22 product subcategories.

For guidelines which specify removal efficiencies of 95% to zero discharge by 1977, the guidelines have not specified the measures and practices to be considered under Section 304(b) (2). Even the requirements of Section 304(b) (1) have only been partly met. To require the application of best available technology economically achievable in 1977, both the requirements of best practicable control technology and best available technology must be taken into account.

Zero discharge is in theory achievable if all involved variable factors are resolved and the ultimate disposal of waste residuals is allowed under other provisions of law and all other environmental consequences and stresses are acceptable to all segments of our society. This is not to imply that the imposition of zero discharge is indeed feasible in practice. The unrestricted application of technology makes most things possible, but the sacrifices are great and the economic, social, and environmental consequences would be unacceptable in most instances. The guidelines in

Honorable Russell E. Train
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establishing zero discharge requirements have not considered the affordability of the total cost to a particular industry of achieving zero discharge as well as the effluent reduction benefits of going to zero discharge by 1977 instead of 1983 or later.

Congress established the National Study Commission (NSC) under Section 315 to evaluate all aspects of the total economic, social, and environmental effects of achieving or not achieving the effluent limitations and goals set forth for 1983. The NSC report must be submitted by October 19, 1975. Congress intended that there be a review of the impact of the 1983 effluent limitations before the limits are implemented.

The practical result of applying many of the 1977 effluent limitations is that extensive process and procedural innovations, changes in operating methods, and very substantial process changes will be necessary to meet the guidelines. Best practicable control technology currently available is defined on page 101 of the House Consideration of October 4, 1972 as the:

"treatment facilities at the end of a manufacturing, agricultural, or other process rather than control technology within the process itself."

Certainly some process changes may be required by 1977 under Section 304(b)(1)(B), but very substantial changes in processing are not required until 1983 under Section 304(b)(2)(A). The guidelines for 1977 would mandate all types of process changes immediately to meet the levels of reduction.

Besides, even if process changes were required by the Act, the control technology for 1977 is not "currently available" for those processes specified. In many instances technology cannot be transferred to treat certain types of troublesome effluents. We feel that the EPA has not demonstrated that the technology is currently available within a

"reasonable level of engineering and economic confidence in the viability of the process."

as set out on page 101 of the House Consideration of October 4, 1972.

Honorable Russell E. Train

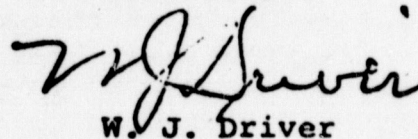
Page five

November 12, 1973

It should be further pointed out that Section 301(b)(2)(A) places the burden upon the Administrator to show that zero discharge is technologically and economically achievable. This has not been done. The guidelines fail to recognize the position taken by Mr. Ruckelshaus that the discharge of pollutants on land is not zero discharge but merely tertiary treatment. The water has to go somewhere.

These matters relate to a number of point source categories for which the Agency has or intends to publish proposed rules. Of specific concern to our member companies are the phosphate manufacturing, plastics and synthetics, inorganic chemicals, and organic chemicals point source categories. We encourage the Agency to alter its approach so as to bring about more orderly water pollution control programs under the law.

Sincerely,

A handwritten signature in dark ink, appearing to read 'W. J. Driver', is written over the typed name.

W. J. Driver

4/12
JAN 15 1974

Mr. W. J. Driver
President
Manufacturers Chemists Association
1625 Connecticut Avenue, N.W.
Washington, D.C. 20009

Dear Mr. Driver:

The Administrator has asked me to respond to the comments of your Association which request that the Agency redirect its approach to establishing effluent limitations guidelines pursuant to sections 301 and 304 of the Federal Water Pollution Control Act, as amended. While there are difficulties in establishing these guidelines because of the complexity not only of the language of the Act but also the large number of plants within the same industrial categories I am unable to agree with your reading of the Act that the Environmental Protection Agency (EPA) is proceeding in an unjustified manner.

You have suggested that our procedures for adopting the effluent guidelines violate the Administrative Procedure Act and that adjudicatory hearings should be provided. The Administrative Procedure Act however requires that formal hearings precede administrative ratification only when rules are required by statute to be made on the record after opportunity for an agency hearing... 5 U.S.C. 553(a). Since sections 301, 304 and 306 of the FWPCA do not require a hearing at all but alone require that the decision be made on the record after opportunity for hearing, I believe that there is no basis for your contention that we should provide an adjudicatory hearing. This position has been affirmed in recent Supreme Court decisions. See *United States v. Allgeier* - *United States Corporation*, 405 U.S. 742 (1972) and *United States v. United States Fidelity Co.*, 416 U.S. 294 (1973). I also call your attention to the case of *United States v. United States Fidelity Co.*, 416 U.S. 294 (1973) which holds that an adjudicatory hearing is not required solely because the rule making is directed toward a limited number of sources.

With respect to whether EPA should specify that the guidelines are only guidance and are not mandatory in the absence of permits, which

would allow at the time of issuance of a permit an opportunity to determine the reasonableness of a particular effluent limitation on the basis of the individual plant situation, it is our opinion that such an approach would contradict the clear requirements of the Act. The basic approach of the Act is to achieve nationally uniform standards so that polluters may not derive unfair economic advantage by leeching in States with lax enforcement procedures. This uniformity would be lost if individual cost-based variances could be granted, particularly when the standards may be applied through a permit program administered by a State which may have different attitudes towards variance applications. For this reason, the guidelines must establish nationally uniform limitations to be implemented by the permit system rather than allowing individual determinations at the time of each permit application. Congress certainly made no reference in either section 304 or section 402 that the factors to be considered in setting effluent standards, which are described in section 304, are also to be applied when issuing individualized permits under section 402. It should be pointed out that section 304(a)(1), in listing the conditions to be imposed in all permits issued under that section, contains no reference to section 304 although several other sections are specifically enumerated. Moreover, many of the factors specified in section 304 clearly only make sense if they are to be considered on an industry-wide basis, e.g., total cost of technology in relation to effluent reduction benefits, and non-water quality environmental impact, including energy requirements.

In fact, where Congress did intend that there be a permit-by-permit analysis of the individual problems of particular discharges, it expressly provides for this. Section 301(c) provides for an individual variance from the 1975 standards based on economic capabilities of the individual discharger and section 304(a)(2) provides for a specific variance from water quality requirements based on cost-benefit balancing. Similar opportunity for individual variances relating to the discharge of thermal pollutants is provided for in section 316(a). The failure of Congress similarly to provide for this type of individualized analysis in section 402 cannot be ignored.

Finally, the legislative history confirms EPA's interpretation:

The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from

the requirement to achieve effluent limitations based on best available technology economically achievable. S. Rep. No. 92-1236, 92nd Cong., 2nd Sess., 121 (1972).

Senator Muskie submitted a statement that was even more explicit: "The conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class." Vol. I, Legislative History, p. 172.

One final comment from the legislative history is also relevant. With respect to whether the guidelines should establish percentage effluent reductions which are achievable, rather than specific effluent limitations, the conference committee specifically provided that:

"Except as provided in section 301(e) of this Act, the intent of the Congress is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations. S. Rep. No. 92-1236, 92nd Cong., 2nd Sess., 126 (1972).

In addition, you question the validity of EPA establishing production-based guidelines. While the Act does not speak to the exact format the guidelines are to take, it certainly does not preclude expressing effluent limitations in terms of an amount of pollutant which may be discharged for a corresponding amount of end product produced. The legislative history confirms that Congress anticipated that this would in fact occur: "In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level." (emphasis added) S. Rep. No. 92-414, 92nd Cong., 1st Sess., 50 (1971). Whether such approach is inappropriate with respect to any particular industry or sub-category of industries is, of course, a factual matter but it is not, as you suggest, an indefensible approach to setting the standards. Any objections you have to a particular category or sub-category should be made with reference to your comments on the proposed guidelines.

Finally, I would like to discuss what I perceive to be your interpretation that since Congress did not specifically provide for "no discharge" until

at least 1983, EPA is precluded by the statute from requiring this degree of control in 1977. It is the position of EPA that the intent of Congress was to clean up the waters of this country as soon as possible with a goal of achieving total elimination of all discharges no later than 1983. In establishing the two-phase approach to implementing the no-discharge goal, Congress acknowledged the fact that certain industries could not proceed as rapidly as others and thus tempered its requirements for prompt action toward achieving "no discharge" by providing interim goals which consider the economic and technological problems in relation to the time frame permitted for compliance.

However, in no way do we consider this to mean that the criteria established by Congress to define "best practicable control technology" preclude achievement of "no discharge" by 1977. In establishing the "best practicable control technology," EPA may determine that a no-discharge limitation is in fact "practicable" by 1977 as that degree of limitation is defined in the Act, such a determination - if supported by the facts - does not mean that EPA has established a "best available control technology" standard for 1977, as you suggest.

I believe that this approach carries out the intent of Congress as indicated by the comments of the major participants in the adoption of the 1972 Amendments. Senator Muskie, in two debates on the conference bill, made it very clear that while polluters were to achieve "best practicable technology" by 1977, also on record was the Administrator could not require compliance by an earlier date. And the same applied to the Phase II "best available technology," with respect to which he said: "The Administrator retains the authority to require the application of these controls at an earlier date, and it is intended that he will require their application at the soonest practicable time." Vol. 2, Legislative History, pp. 102-3. It is therefore clear that Congress intended discharges of pollutants to be eliminated as soon as possible within the limitations prescribed in sections 301 and 304. Moreover, this approach is a sound one from a practical standpoint as well because the deadlines established by the Act are outside dates - the specified degree of reduction must be achieved "not later than 1977 and not later than 1983" - and any limitation which can be achieved by a particular source prior to these dates will also result in an improvement of water quality during the interim period, which is certainly within the spirit of the Act. See Section 101(a).

In establishing the guidelines for "best practicable control technology" to be applied in 1977, EPA has applied the criteria specified in sections 301(b)(1)(A) and 304(b)(1) and has determined that in some instances these criteria, although less stringent than the criteria

established for the guidelines in 1983, indicate that 'no discharge' is practicable for certain sources in 1977. EPA has not, as you indicated, ignored the requirements of section 301(b)(2). Those requirements were simply inapplicable to those situations. While you may disagree that EPA's conclusions are justified on the basis of the information available, i.e., whether the proper economic, technological, and process factors have been adequately considered, that disagreement does not provide evidence of any misinterpretation of the requirements of the Act by EPA (i.e., requiring 'best available technology' in 1977). It is solely a technical disagreement with the adequacy of the information to support, within the specified parameters, a finding that no discharge is in fact "practicable." However, a detailed discussion of the basis for those findings is neither relevant nor appropriate to properly respond to the questions you have raised at this time.

With respect to this general subject, I would make one final comment. I feel that your position that a no-discharge standard is only to be required in 1983 is untenable from a policy standpoint as well as a legal one because this approach would often require EPA to permit in 1977 a degree of effluent reduction which would be less stringent than the facilities are capable of doing and would perhaps in some instances reward those sources which have failed to invest in pollution abatement equipment even though it was available. As the legislative history indicates, Congress clearly envisioned that in 1977, the Administrator could require technology that was not widely in use if it were available and if control practices in the industry were uniformly inadequate. It would be an untenable position for EPA to have to require a lesser degree of control than "no discharge" despite the total availability of control equipment to achieve that limitation at a reasonable cost for the affected industry, merely on the premise that EPA could not require such a degree of control until 1983. As long as the no discharge standard is justified on the basis of the criteria specified by Congress to be considered in 1977, EPA has the authority to prescribe that degree of control.

Sincerely yours,

/s/

Alan C. Kirk, II
Assistant Administrator for
Enforcement and General Counsel (EG-322)

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MANUFACTURING CHEMISTS ASSOCIATION

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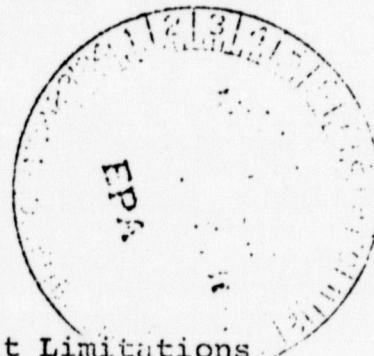
WILLIAM J. DRIVER
PRESIDENT

November 12, 1973

EPA Information Center
U. S. Environmental Protection Agency
Washington, D. C. 20460

Attention: Mr. Philip B. Wisman

Subject: 40 CFR Part 415 - Effluent Limitations
Guidelines and Standards of Performance
and Pretreatment for Inorganic Chemicals
Manufacturing Point Source Category



Dear Sirs:

This letter is submitted on behalf of the Manufacturing Chemists Association (MCA) with regard to proposed Effluent Limitations Guidelines and Standards of Performance and Pretreatment for Inorganic Chemicals Manufacturing Point Source Category (40 CFR Part 415), published in the FEDERAL REGISTER October 11, 1973.

MCA is a non-profit trade association with 170 United States member companies representing more than 90 percent of the production capacity of basic industrial chemicals within this country. As manufacturers and handlers of the chemicals in question, our members have a direct and critical interest in the proposed rules.

We are pleased EPA has reaffirmed that total dissolved solids (TDS) per se do not cause deleterious effects in receiving waters and cannot be practicably limited by across the board application of technology. We concur in the concept of relating limits to specific "harmful" constituents, and we support the consideration the Agency has given to non-water quality and related cost/benefit impacts.

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Our overall reaction to the proposed rules is one of serious concern, as a number of major and critical unresolved issues remain, namely:

- . the impracticable, if not impossible, imposition of economically prohibitive zero discharge;
- . the need for guidelines as a range for application in a flexible manner;
- . levels of control consistent with and supported by a demonstrated technological base;
- . those factors mandated by Congress taken into account in the application of effluent limitations;
- . pretreatment standards which do not prohibit continued or future industrial participation in joint treatment facilities.

We expressed those concerns in previous communications and now recommend that the Agency:

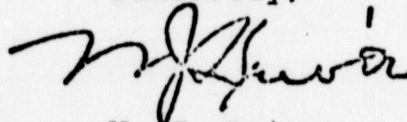
- . adjust its narrow interpretation of the Act and of Congressional intent, and
- . restructure its program to one of equitable enforcement of effluent limitations derived from a technically sound guidelines and standards base.

We append herewith technical assessment comments and specific reactions developed by major producers of inorganic chemicals. A copy of related previous communications, listed as follows, can be supplied upon request:

- . October 26, 1972 - letter by W. J. Driver to Allen Cywin, Director of EPA Effluent Guidelines and Standards Division, relative to a working document on effluent limitation guidance for the inorganics industry category.

- . November 21, 1972 - letter by H. B. Brown to Allen Cywin transmitting documents presented by chemical industry experts during EPA's November 16, 1972, Effluent Guidelines Seminar - Inorganic Chemicals.
- . May 11, 1973 - letter by H. B. Brown to Dr. Martha Sager, Chairman, Effluent Standards and Water Quality Information Advisory Committee, relative to the Committee's functional activities in the EPA development of effluent limitations guidelines.
- . August 1, 1973 - letter by W. J. Driver to Allen Cywin relative to technical review comments on June 1973 draft Development Document for Effluent Limitations Guidelines and Standards of Performance for Inorganic Chemicals, Alkali and Chlorine Industries and Non-Fertilizer Phosphorus Chemicals Industry.
- . October 17, 1973 - letter by W. J. Driver to Administrator Train relative to the invitation to comment on proposed alternative approaches by which effluent limitations are to be determined.
- . November 12, 1973 - letter by W. J. Driver to Administrator Train relative to legal and technical reasons for redirection of EPA effluent limitations program.

Sincerely,



W. J. Driver

Attachments

5266

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent


CELANESE CORPORATION, et al.,
Intervenors

CERTIFICATE OF SERVICE

I certify that two reproduced copies of the Brief for the Respondent have been served upon counsel, by placing same in the United States mail, postage prepaid, properly addressed, this 13th day of September, 1974, to:

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